herself from her body and that he had kept it and given it to Dr. Tan.

Mr. Marshall objected to evidence of the wife's statements being admitted, but Adams J. admitted them on the ground that they showed a general consistency of statement as to the cause of her death made by the deceased. We consider that this evidence was properly admitted especially in view of section 32 of the Evidence Ordinance, No. 11 of 1950, the relevant portion of which reads as follows:—

"Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases—

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

In addition to the statements made to her husband the deceased had given the history of her illness to Dr. Tan and before she died made a statement to a Magistrate in the hospital. This statement was strongly criticised by Mr. Marshall and chiefly on the ground that it did not contain the *ipsissima verba* of the deceased. The Magistrate gave evidence a year or so after recording this statement and his recollection with regard to questions he may have put was impaired, but there seems no reason for thinking that he did not record correctly the actual words of the deceased. In any event the statements by the deceased to Dr. Tan and the Magistrate were clearly admissible in our opinion in accordance with section 32 of the Evidence Ordinance.

Finally, there remains the question of corroboration of the deceased's statement, or dying declaration, to the Magistrate and to Dr. Tan. Clearly the deceased was an accomplice to the criminal act of abortion and, as such, corroboration of her evidence was desirable and necessary, though the urgency of the need for corroboration was not great in the circumstances present in this case. The learned trial Judge considered the question of corroboration and found it among other things in the visits to the appellant.

Upon consideration of all the evidence Adams J. was satisfied that the accused procured the abortion of the deceased with the stick P.1. and that as a result of that abortion performed upon the deceased the deceased contracted septicaemia and died as a result. With this conclusion we were in entire agreement and saw no reason for interfering.

Appeal dismissed.

Re INDIAN OVERSEAS BANK LTD.'S APPLICATION;

AMERICAN INTERNATIONAL ASSN. CO. LTD. v. HO CHOOI SOON

[O.C.J. (Hepworth J.) January 15, 1962]

[Penang — Originating Summons No. 121 of 1959]

Banking Law — Issue arising from Interpleader Summons — Forged endorsement on misappropriated cheque — Cheque passed by defendant to applicant bank for payment into his account — Cheque uncrossed — Crossed by applicant — Credit given to customer — Discovery of forgery — Customers' account debited — Claim by drawer to ownership of cheque — Customer claiming to be holder in due course — Bills of Exchange Ordinance, 1949, s.32 — Settlement of account between a bank and its customer — What constitutes settlement of account — Bills of Exchange Ordinance, 1949, s.30(2).

Plaintiff drew a cheque, which was uncrossed, for the sum of $3,243.87, in favour of one Mr. Yeo Wee Yang on order. This cheque was misappropriated by a member of their staff in their Penang branch who forged the endorsement of Yeo Wee Yang on the cheque and then gave it to the defendant who deposited it with the applicants in favour of his account with them. Applicants crossed the cheque and having collected on it they duly credited the defendant's account with the amount of the cheque. The defendant then issued his own cheque to the value of the cheque he had received to the person who had forged the indorsement.

Nearly two years later, plaintiffs wrote to the applicants claiming to be true owners of the cheque as the endorsement was a forgery and requesting the applicants to refund to them the amount of the cheque.

The applicant bank made no refund but debited the account of the defendant with the amount of the cheque and then applied for and obtained an Interpleader Summons in which an order was made on February 5, 1960 for pleadings to be filed by plaintiffs and defendant to determine who was entitled to the sum of $3,243.87 held by the applicants ([1960] M.L.J. 286).

The misappropriation and forgery being admitted by all parties the questions before the Court were (i) whether the applicants could lawfully debit the defendant's account with the amount of the cheque on an allegation of forgery made by the plaintiffs after a period of nearly two years and (ii) if they could, (becoming stake holders thereby) whether the plaintiffs or the defendant was entitled to the sum held by the applicants.

Held: (1) whether the applicants could lawfully debit the defendant's account depended upon the question whether there had or had not been a settlement of account between the applicants and the defendant. A lapse of two years would not operate as a bar to such debiting if there was no settlement of account. The evidence did not disclose any settlement of account and therefore applicants were justified in law in debiting the defendant's account. Dictum of Collins L.J. in *Bavins, Junr. & Sims* v. *London & South Western Bank Ltd.* (3) cited and followed;

(2) since the negotiation of the cheque was effected through fraud, section 30(2) of the Bills of Exchange Ordinance, 1949, applied and the burden of proof was on the defendant to show that subsequent to the forgery he had given value in good faith for the cheque. It was not disputed that defendant had given value but on the evidence it was clear that this had not been done in good faith. Consequently, the defendant's claim to be a holder in due course failed;

(3) but even if it could be shown that the defendant took the forged cheque in good faith and for value, plaintiffs could still recover the money because the defendant had not lost his remedy against some previous party by being deprived by lapse of time of the opportunity of giving notice of dishonour.

Per curiam: the applicants were not entitled to the protection of section 82 of the Bills of Exchange Ordinance, 1949 because the cheque, when received, was not crossed.

The Imperial Bank of Canada v. *Bank of Hamilton* (4) followed.

Cases referred to:—

(1) *The London & River Plate Bank Ltd.* v. *The Bank of Liverpool Ltd. & Ors.* [1896] 1 Q.B. 7.

(2) *Capital & Counties Bank Ltd.* v. *Gordon* [1900] A.C. 240.

(3) *Bavins, Junr. & Sims* v. *London & South Western Bank Ltd.* [1900] 1 Q.B. 270.

(4) *The Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A.C. 49.

TRIAL OF AN ISSUE.

Ong Huck Lim for the plaintiff.

Lee Thean-Chu for the defendant.

Cur. Adv. Vult.

Hepworth J.: This is the trial of an issue arising out of an Interpleader Summons, in which an Order was made on the 5th February, 1960, that:—

"The said American International Assurance Company Limited and the said Ho Chooi Soon do proceed to the trial of an issue in this Court to inquire whether the said sum of $3,243.87 is the property of the said American International Assurance Company Limited as against the said Ho Chooi Soon; in which issue the said Assurance Company is to be plaintiff and the said Ho Chooi Soon is to be defendant; *And* that pleadings be filed in the said issue."

The facts disclosed are as follows. At the beginning of May, 1957, one Yeo Wee Yang, who held a 20 year Endowment Participating Policy for $10,000 numbered 200396 with the plaintiff company, requested them to pay him the surrender value of the policy. The surrender value as at the anniversary date of the said policy, the 1st July, 1957, was $3,270, but as payment was to be made on the 13th May, 1957, the plaintiff company discounted a small amount to cover the period between the 13th May, 1957, and the anniversary date, and on the 13th May, 1957, forwarded an open cheque for $3,243.87 (P.1) made payable to Mr. Yeo Wee Yang or order to their Penang office (this cheque is referred to hereafter as the said cheque). Mr. Yeo Wee Yang refused to accept the said cheque and returned it to the plaintiff company's Penang office and demanded payment of the full sum of $3,270.

One Chee Hock Chye was the Manager and one Lim Swee Beng was the Secretary of the plaintiff company's Penang Office.

Instead of returning the said cheque to the plaintiff company's Singapore office the said Lim Swee Beng fraudulently misappropriated the said cheque to his own use. At the request of the said Lim Swee Beng the defendant, who knew the said Lim Swee Beng and knew he was the Secretary of the plaintiff company's Penang office, paid the said cheque into his own account with the applicant bank, the Indian Overseas Bank Ltd., and after it had been cleared issued his own cheque on the 21st May, 1957, made payable to cash or bearer (D.3) and gave it to the said Lim Swee Beng. This cheque was then negotiated for cash by the said Lim Swee Beng.

Some short while later it appeared that the plaintiff company in Singapore became aware that misappropriation by the said Lim Swee Beng was or had been taking place at Penang with the result that the chief accountant of the plaintiff company (P.W.1) was sent to Penang to investigate the matter. Then on the 21st June, 1957, Chee Hock Chye, the manager of the plaintiff company's Penang office, laid an information with the Police, and the said Lim Swee Beng was arrested and charged on the 22nd June, 1957, with criminal breach of trust of a large sum of money, part of which was represented by the sum of $3,243.87 with which we are concerned, and on the 29th June, 1957, he was convicted on a plea of guilty and sentenced to two years' imprisonment.

On the 28th June, 1957, the plaintiff company's chief accountant (P.W.1) wrote from Singapore to their Penang office stating that during his recent stay in Penang he had contacted Mr. Yeo Wee Yang who had told him that he wished to surrender his Policy as at the 1st July, 1957. Accordingly the plaintiff company forwarded to their Penang office a cheque for $3,270, which was in due course forwarded to Mr. Yeo Wee Yang and paid by him into his account.

On the 4th June, 1959, nearly two years later, a firm of solicitors, acting for the plaintiff company, wrote a letter to the applicant bank claiming that as the endorsement on the said cheque which had been paid into their account by the defendant was forged, the plaintiff company remained the true owner of the cheque and therefore they requested the applicant bank to forward to them immediately the sum of $3,243.87. This the Indian Overseas Bank Ltd. did not do, but they did debit the account of their customer, the defendant, with the amount of the said cheque.

It is not contested that the said Lim Swee Beng had misappropriated the said cheque and it is agreed that the endorsement "Yeo Wee Yang" thereon was a forgery.

The plaintiff company state that the said Lim Swee Beng never at any time was given any authority whatsoever by them to guarantee the endorsements of the plaintiffs' policy holders. They contend that the said Lim Swee Beng never at any time in law had any right title or interest in the said cheque and thus could not in law give any valid right title or interest to the defendant whether the said Lim Swee Beng negotiated the said cheque to the defendant for value and/or whether the defendant took the said cheque from the said Lim Swee Beng in

good faith without any notice of a defect in the title of the said Lim Swee Beng. They contend that the plaintiffs alone were at all times the true owners of the said cheque and never at any time ceased to be the true owners thereof. In these circumstances the plaintiffs claim that they are entitled to the proceeds of the cheque now held by the applicant bank as stakeholders.

The defendant stated that when the said cheque was handed to him by the said Lim Swee Beng it had endorsed on the back the name "Yeo Wee Yang" and a further endorsement stating "endorsement guaranteed" with, immediately underneath, the signature "Lim Swee Beng" purporting to sign as agency secretary on behalf of the plaintiff company. The defendant said that he did not know that the endorsement "Yeo Wee Yang" was a forgery. The said Lim Swee Beng guaranteed the endorsement with the company's chop, and he did not know that the said Lim Swee Beng had no authority to guarantee the endorsement. The defendant's defence is therefore that he is a holder in due course, that is to say that he took the cheque in good faith and for value and that at the time the cheque was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

After the Interpleader Summons was issued but before any step was taken thereunder the defendant issued a Writ against the applicant bank and subsequently issued a Summons under Order 14 for leave to sign final judgment against the bank. On being granted leave to sign final judgment by the Senior Assistant Registrar the applicant bank appealed. This appeal was heard by Mr. Justice Rigby, who allowed the appeal giving the applicant bank unconditional leave to defend and ordering that the proceedings in that action should be stayed pending the determination of the proceedings in the Interpleader Summons. My task in these proceedings has been made considerably easier by the fact that Rigby J. prepared a written judgment* when considering the appeal from the Senior Assistant Registrar, which deals in considerable detail with the law applicable in these proceedings. Mr. Ong Huck Lim, who appears for the plaintiff company, has in fact adopted the observations and conclusions to which the learned Judge came in this judgment, and I propose to quote substantial parts of it. It must, however, be borne in mind that reference therein to the defendant bank is a reference to the applicant bank in these proceedings, to the plaintiff is a reference to the defendant in these proceedings, and to the American International Assurance Co. Ltd. is a reference to the plaintiffs in these proceedings.

The following extract is, I think, relevant in the present proceedings and is of assistance in considering the questions at issue:—

* [1960] M.L.J. 286.

The main argument advanced before the learned Registrar was that whilst it was conceded that the payment of money made under a mistake of fact as to the instrument itself can be recovered by the payer, a condition precedent to such recovery was that the mistake should be discovered at once and repayment claimed at once. In support of that argument reliance was placed on the case of *The London & River Plate Bank Ltd.* v. *The Bank of Liverpool Ltd. & Ors.* (1) The headnote of that case reads:—

'When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries.'

It was contended that the plaintiff was a holder in due course of the cheque; that the defendant bank debited his account two years after the proceeds had been collected by them and paid into his account; and that they did this simply on the strength of the correspondence from the makers of the cheque who claimed to be the true owners of the cheque and entitled to the proceeds thereof.

I must confess that I find the case to be one of considerable difficulty and complexity. At first sight it certainly seems a startling proposition that a bank, two years after it has collected the proceeds of a cheque paid by a customer into his account and credited the customer with that amount, should claim the right to debit the customer with that amount simply on the representation of the makers of the cheque that it was a forgery.

Since the hearing of the appeal I have also had the advantage of hearing the arguments of both counsel on the defendant bank's application for an order for interpleader proceedings. Two factors are now clear and indisputable as a result of those arguments. First, there can be no doubt that the cheque in question was misappropriated by Lim Swee Beng and the endorsement thereon of the name of Yeo Wee Yang was, in fact, a forgery. Secondly, Mr. Hume, for the defendant bank, made it clear that the cheque was not crossed when the defendant bank received it, but that the defendant bank crossed it specially to itself after it had received it for collection. That being so, since the endorsement of the name of the payee on the cheque was a forgery, and since the defendant bank was not able to avail itself of the protection afforded to collecting banks by section 82 of the Bills of Exchange Ordinance, 1949 in the case of crossed cheque, then the defendant bank, in collecting payment on the cheque was, *prima facie*, guilty of conversion and was liable to an action for conversion, or for money had and received for their use, at the instance of the true owners of the cheque, the American International Assurance Co. Ltd. (See *Capital & Counties Bank Ltd.* v. *Gordon*) (2). The defendant bank must have found itself in a position of some difficulty when it received the correspondence from the solicitors of the Assurance Co., claiming that they were entitled, as true owners, to the cheque and entitled to its proceeds. On the strength of that correspondence, and in the absence of any proceedings having yet been instituted against them, were the defendant bank entitled to debit the account of the plaintiff, on whose behalf, two years previously, and acting as his collecting agents, they had collected the money from the Assurance Co.'s account with the paying bank, and paid it into his account? In the absence of any authority to guide me I would have been impelled to the conclusion that it was not so entitled and that the defendant bank, being unable to avail itself of the protection afforded by section 82 of the Bills of Exchange Ordinance by reason of the fact that it had failed to ensure that the cheque was crossed by its customer before passing it for collection, was not entitled to take advantage of its own want of precaution by debiting the customer's account after collection.

"A banker cannot dishonour his customer's cheque upon a mere claim by a third person to the moneys standing to the credit of the account: otherwise the banker would often be set the task of conducting a judicial inquiry into the rights of parties. The person

claiming the moneys should obtain an injunction restraining the bank from honouring the customer's drafts". (See *Grant's Law of Banking*, 7th edition, page 97). By analogy, it would seem to me that when a bank, as a collecting agent for a customer who has presented a cheque for collection, has received the money due and credited it to its customer's account, it could not subsequently, on the representation of a third party — albeit, the drawer of the cheque — that the cheque was a forgery, debit the customer's account with the proceeds already collected and paid in. To act in such a manner appears to me to be an attempt by the bank to absolve itself of its own want of precaution in failing to ensure that the cheque was crossed generally or specially by the customer to himself before it was presented by him to the bank for collection.

The learned Judge then referred to the case of *Bavins, Junr. & Sims* v. *London & South Western Bank Ltd.* [3] The headnote of that case is as follows:—

"The plaintiffs received from a company which was indebted to them, an order addressed to the company's bankers for the payment of the amount of their debt. The order was not a cheque within the meaning of the Bills of Exchange Act, 1882, because the payment was made conditional upon signature of a receipt appended to the order. The order was stolen from the plaintiffs, the receipt being then unsigned. It was subsequently handed to the defendants, a banking company, with a forged endorsement and receipt thereon, for collection on behalf of a customer of theirs whom they credited with the amount of it. It did not appear that the customer knew that the order had been stolen. The order was presented by the defendants to the bank to which it was addressed, and the amount specified therein was thereupon paid by that bank to them. Subsequently, the plaintiffs gave notice to the defendants that the order was stolen from them, and claimed the amount received by the defendants upon it. Nothing had in the meantime taken place to debar the defendants from cancelling the credit given to their customer as beforementioned:—

Held, that the plaintiffs were entitled to recover the amount received by the defendants upon the order as money received for the plaintiffs' use."

In the course of his judgment in that case A. L. Smith L.J. said, at page 275:—

"It was argued that the defendants, being merely agents for their customer, and having in effect paid the money over to her before they had notice of the plaintiffs' claim, an action for money had and received will not lie against them. But all they really did was to credit the customer with the money, and I see no reason why they could not have debited the customer with the amount upon its being shown that she had no title to the document, and that it belonged to the plaintiffs."

Collins L.J. at page 277, said:—

"They have wrongfully so dealt with a document belonging to the plaintiffs that they have received its full face value; and I think that the result is that the money so received by them by reason of that wrongful user of the plaintiffs' document can be treated as money received by them to the use of the true owners of the document. That being so, what is the answer which the defendants set up to the claim of the plaintiffs for the money belonging to them which the defendants have in their hands? The only answer which they set up appears to be the fact that they have credited their customer with the amount of it. Apart from any other argument, the answer which the plaintiffs' counsel made to this appears to me conclusive, namely, that a credit so given to a customer by a bank is in its nature provisional only, and depends upon the question whether the cheque or other document finally results in a right to recover and retain the money. The customer is only credited with the amount subject to the risk of that afterwards turning out not to be so. There does not appear in this case to have been any settlement of account between the defendants and their customer which debarred them from recovering from their customer the amount with which they had credited her."

Lastly, Vaughan Williams L.J. at page 278, said:—

"Although the customer had been credited with the amount received by them, it was merely a provisional credit, and there had been no such settlement of accounts between them as disentitled the defendants as against their customer to strike out the credit."

The conclusion drawn from this judgment is formulated in the passage appearing in *Halsbury's* Laws of England, 3rd edition, Volume II, page 209 in the words:—

"A collecting banker is not precluded from debiting his customer with money he has paid him as the proceeds of a negotiable instrument should the banker have to account for them to the true owner."

Whilst it is perfectly true that two years have passed since the money was credited to the plaintiff's account and that during that time there have been numerous payments in and payments out of that account, in the words of Collins L.J. there does not appear to have been any settlement of account between the plaintiff and the defendant bank which debarred the defendant bank from recovering from its customer the amount with which it had credited him. Nor has the plaintiff been prejudiced by being precluded by the passage of time from any right of recourse he might have had against a prior holder in due course of the cheque, since it is manifest that the prior endorsement upon the cheque was itself a forgery so that no valid title to the instrument could have been passed to him.

The learned Judge went on to say that on the authority of *Bavins'* case he was driven to the conclusion that the applicant bank were entitled to debit the defendant's account with the value of the said cheque.

The defendant in these proceedings is relying on *The London & River Plate* case. Rigby J., in expressing his view that this case did not supply the answer on the facts, stated as follows:—

"Like the learned Registrar, I was originally of the opinion that that judgment was conclusively in favour of the plaintiff and that the defendant bank, by its delay, was precluded from recovering payment from the plaintiff. In that case the plaintiff bank was seeking to recover from the defendant bank, who were holders in due course for value, the amount of a draft which had been accepted by the plaintiff bank and which they had paid, but which they alleged they had paid under a mistake of fact. It appeared, a long time after payment had been made, that the endorsements on the draft were forgeries. It followed that the plaintiffs were not liable upon the draft at the time they had paid it. But the defendant bank had admittedly become possessed of the bill, as holders in due course for value, and were ignorant of the fact that the endorsements were forged. Mathew J., for the reason already quoted from the headnote of the case, dismissed the plaintiff bank's claim. That decision was criticised by the Privy Council in the later case of *The Imperial Bank of Canada* v. *Bank of Hamilton* [4] as too sweeping. The contrasting effect of the two decisions is concisely summarised in *Paget's Law of Banking*, 5th edition, at page 243. The gist of the decision in the former case was that money paid on a negotiable instrument to an innocent person could not be recovered if he had the money in his possession for such a period that his financial position might, not necessarily, would, be affected if he had to refund. On the other hand, the view taken by the Privy Council was that the money could be recovered unless the recipient, by lapse of time, had lost his remedy against any previous party by being deprived of the opportunity of giving notice of dishonour. Accepting the latter view it is, I think, abundantly clear

that the plaintiff, by lapse of time, had not lost any remedy against any previous party by being deprived of the opportunity of giving notice of dishonour for the simple reason that, the prior endorsement being a forgery, there was no previous party to whom he could effectively give notice of dishonour."

It is to be observed in *Bavins'* case that it is envisaged that there may be a settlement of account between a Bank and its customer which debars the bank from recovering from the customer an amount with which he has been credited. Collins L.J. said:—

"There does not appear in this case to have been any settlement of account between the defendants and their customer which debarred them from recovering from their customer the amount with which they had credited her."

And again Vaughan Williams L.J. said:—

"There had been no such settlement of accounts between them as disentitled the defendants as against their customer to strike out the credit."

The theory of a settled account is generally applicable to a case of mutual debits and credits. Thus where A owes B money or may owe B money and B owes A money or may owe him money and in their accounts they strike a balance and agree that balance that truly represents the financial result of their transaction. (*Strouds Judicial Dictionary*, 3rd edition, Volume 4, page 2734).

Whether there has been a settlement of account between a banker and his customer must depend upon the facts of each case, and as there is no evidence in the present case as to what the position was or is as between the applicant bank and the defendant further consideration of this point is unnecessary. It may well be, however, that there are normally settlements of account between a banker and his customer at intervals of less than two years which would in the ordinary course of events preclude the banker from debiting his customer's account, and apparently having the right to do so, in the circumstances which Rigby J. found so startling.

The defendant claims, as I have already said, that he is a holder in due course of the said cheque, paid by him into the applicant bank for collection and payment of the proceeds into his account, within the meaning of section 29(1)(b) of the Bills of Exchange Ordinance, 1949. The plaintiffs, however, allege that the negotiation of the said cheque was effected with fraud, an allegation which is not denied by the defendant, and accordingly section 30(2) of the Ordinance applies and instead of the defendant being deemed to be a holder in due course the burden of proof is shifted to him unless and until he can prove that subsequent to the illegality value has in good faith been given for the said cheque. He must show that he took the said cheque both in good faith and for value.

In the face of the cheque D.3 I do not think it can be said that value was not given, but the question of good faith is another matter.

The first thing to be noted is that the said cheque was an open cheque and was made payable to Mr. Yeo Wee Yang or order and accordingly, at any rate in theory, all that was required in order to obtain cash for it from the bank upon which it was drawn was for the payee to endorse it and for it to be presented for payment. In practice the bank upon which it was drawn would probably in such circumstances enquire as to the *bona fides* of the endorsement and the person who presented it for payment. But if the whole transaction was *bona fide* cash could be obtained in this manner. All that was required was the endorsement of the said cheque by the allegedly sick payee, which perusal of the said cheque would have shown had apparently already been done. Nothing more was required to obtain cash. There was no need for the defendant to be brought into the matter at all. The method which was adopted of the payment of the said cheque into the defendant's account and subsequently the issue by him of an open cash or bearer cheque to the said Lim Swee Beng ensured that awkward questions would not be asked. Why did the defendant not point out to the said Lim Swee Beng that as the cheque was an open cheque and had already been endorsed by the payee his assistance was not required to obtain cash?

The second thing is that the payee of the said cheque, Mr. Yeo Wee Yang, was known to the defendant and had been known to him since before the War when he was a partner in a firm of rubber dealers named Yeong Fee & Co. with whom the defendant had small dealings. Did the defendant really think that the payee had no bank account?

The third thing is that the defendant said that on many occasions the said Lim Swee Beng gave him cheques and he gave him cheques in return. These were presumably cheques drawn by the plaintiff company and are probably in respect of sums forming the balance of the amount for the fraudulent misappropriation of which the said Lim Swee Beng was convicted and sentenced to a term of imprisonment. Even if the defendant did not realise that cash could be obtained for open cheques like the said cheque without assistance from him, did it not occur to him that, if so many of the policy holders of the plaintiff company required cash, the plaintiff company's arrangements would be likely to be such as to enable them to obtain cash? Did it not occur to the defendant that something irregular was going on?

In my opinion the defendant has failed to discharge the onus of proving that subsequent to the illegality value has in good faith been given for the said cheque.

But even if the defendant did take the said cheque in good faith and for value, on the authority of the *Imperial Bank of Canada* v. *Bank of Hamilton* and *Bavins'* case the money can be recovered by the plaintiffs because the

defendant has not lost his remedy against some previous party by being deprived by lapse of time of the opportunity of giving notice of dishonour because, as Rigby J. says, the prior endorsement being a forgery, there was no previous party to whom he could effectively give notice of dishonour, and there is no evidence of any settlement of account between the defendant and the applicant bank which debarred the applicant bank from recovering from the defendant the amount with which it had credited him.

I hold therefore that the said sum of $3,243.87 in the custody of the applicant bank is the property of the plaintiffs.

Order accordingly.

Solicitors: *Ong Huck Lim & Co.; Lee Thean-Chu.*

ASIAN ORGANISATION LTD. v. WHITE HUDSON & CO., LTD.

[C.A. (Buttrose, Wee Chong Jin and Ambrose JJ.) January 19, 1962]

[Singapore — Civil Appeal No. 16 of 1961]

Passing-off — Claim to monopoly in colour of wrappers — Meaning of reputation in passing-off actions — What plaintiff has to establish to succeed.

The plaintiffs (respondents on this appeal) are manufacturers of medicated cough sweets which they sold in Singapore under the registered trade mark *HACKS*. These sweets were black oval sweets of a particular size wrapped in orange-coloured cellophane paper on which was printed the word *HACKS*. They were imported in tins in which they reached retailers, who generally displayed them in glass jars and sold them loose. The plaintiffs' sweets were the first medicated cough sweets so sold in Singapore. This mode of sale commenced in 1953, and prior to that medicated cough sweets could only be bought in tins or bottles.

In March 1958 the defendants (appellants on this appeal) imported into and sold in Singapore medicated cough sweets which were sold to retailers in tins, displayed by them in glass jars and sold to the consuming public in loose form. The sweets were originally wrapped in white cellophane paper with the word *PECTO* printed on them but in quite a different manner to that in which the name *HACKS* appeared on the plaintiffs' wrappers. In May 1958, the colour of these wrappers was changed to a shade of orange similar to the wrappers of the plaintiffs' sweets.

The plaintiffs commenced an action for passing-off and alleged that their sweets had become well known and recognised by the public by the particular size, shape, colouring of the sweets, and their orange-coloured wrappers. According to the evidence of the manager of the plaintiffs' agents, the plaintiffs' only complaint was that the defendants copied the orange colour of their wrappers. Evidence was also given that Chinese-speaking customers asked for the plaintiffs' sweets by the equivalent in Chinese of "red paper cough sweets."

The trial Judge granted the plaintiffs an injunction and other relief and the defendants appealed.

Held: (1) (*per* Buttrose and Ambrose JJ.) it is essential for the plaintiff in an action for passing-off to prove that he has selected a peculiar or novel design as a distinguishing feature of his goods, and that his goods are known in the market and have acquired a reputation in the market by reason of that distinguishing feature;

(2) (*per* Buttrose J.) the distinguishing feature of the plaintiffs' sweets was the word *HACKS* and not the colour of the wrapper, and the plaintiffs have no right to a monopoly of orange, red or other coloured paper for wrapping sweets because they are common to the trade;

(3) (*per* Ambrose J.) (i) the distinguishing feature of the plaintiffs' sweets was the word *HACKS* printed on wrappers of a particular shade of orange colour; (ii) the plaintiffs' sweets acquired a reputation in Singapore by reason of the colour of the plaintiffs' wrappers combined with the trade name *HACKS* printed on them; (iii) by imitating the orange colour of the plaintiffs' wrappers but not the trade name *HACKS*, the defendants did not invade the plaintiffs' quasi-proprietary right; (iv) apart from monopolies conferred by patents, and apart from protection afforded by registration, it is open to anyone to adopt the ideas or devices of his neighbour and apply them to his own goods provided he clearly distinguishes his goods from those of his neighbour;

(4) (*per* Buttrose and Ambrose JJ.) by the use of the word *PECTO* the defendants had clearly distinguished their goods from those of the plaintiffs.

Appeal allowed by Buttrose and Ambrose JJ., Wee Chong Jin J. dissenting.

Cases referred to:—

(1) *J.B. Williams & Co.* v. *H. Bronnley & Co., Ltd.* (1909), 26 R.P.C. 765, 771.

(2) *Schweppes Ltd.* v. *Gibbens* (1905), 22 R.P.C. 601, 607.

(3) *M. Saper Ltd.* v. *Specter's Ltd. & Boxes Ltd.* (1953), 70 R.P.C. 173, 178.

(4) *Oertli A.G.* v. *Bowman (London) Ltd.*, [1957] R.P.C. 388, 397.

(5) *Tavener Rutledge Ltd.* v. *Specters Ltd.*, [1959] R.P.C. 355, 362.

(6) *Dunhill* v. *Bartlett & Bickley* (1922), 39 R.P.C. 426, 438.

(7) *Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.* (1900), 17 R.P.C. 48, 57, C.A.

(8) *Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.*, [1901] A.C. 308, 312; (1900), 17 R.P.C. 628, 635, H.L.

COURT OF APPEAL.

K. E. Hilborne for the appellants.

C. L. Duff for the respondents.

Cur. Adv. Vult.

Buttrose J. (read by **Ambrose J.**): This is an appeal from a judgment of Tan Ah Tah J. granting an injunction restraining the defendants their servants and agents from offering for sale, selling or otherwise dealing in medicated cough sweets not manufactured by the plaintiffs and wrapped with the defendants' *PECTO* wrapper without clearly distinguishing it from the plaintiffs' *HACKS* wrapper.

What a plaintiff must prove in a passing-off action such as this was clearly laid down by Cozens-Hardy M.R. in the case of *J.B. Williams & Co.* v. *H. Bronnley & Co. Ltd.* (1). What was there said by the Master of the Rolls was this:

" It seems to me that in the first place he (the plaintiff) must, in order to succeed, establish that he has selected a peculiar — a novel — design as a distinguishing feature of his goods, and that his goods are known in the market, and have acquired a reputation in the market, by reason of that distinguishing feature, and that unless he establishes that, the very foundation of his case fails. If he takes a colour and a shape which are common to the trade the only distinctive feature is that which he has added to the common colour and the common shape,